IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 11TH APRIL 2007 / 21ST CHAITHRA 1929

SA.No. 615 of 1993(F)

AS.69/1987 of SUB COURT, TIRUR
OS.85/1983 of MUNSIFF COURT, TIRUR

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APPELLANTS: (APPELLANTS 2 TO 6 IN THE COURT BELOW AND DEFENDANTS 4 TO 8 IN THE TRIAL COURT.

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1. NARAYANIKUTTY DAUGHTER OF KARIKUTTY ALIAS APPU, PANACHIKKAL, OMACHAPUZHA AMSOM AND KARINGAPARA DESOM, TIRUR TALUK, MALAPPURAM DISTRICT.

2. DAMODARAN, SON OF -DO- -DO-

3. BALAKRISHNAN, SON OF -DO- -DO-

4. VALLI, DAUGHTER OF KIZHAKKANATTA KRISHNAN OMACHAPUZHA AMSOM, KARINGAPARA DESOM, TIRUR TALUK MALAPPURAM DISTRICT.(DIED)

5. KARIKUTTY ALIAS APPUKUTTAN, SON OF PANACHIKKAL THEYYU, OMACHAPUZHA AMSOM, MANALIPUZHA DESOM, TIRUR TALUK, MALAPPURAM DISTRICT.

APPELLANTS 1 TO 3 ARE RECORDED AS THE LR'S OF DECEASED A4 AS PER ORDER DATED 31/3/06 IN MEMO DATED 23.2.05.

BY ADV. SRI K RAMACHANDRAN

RESPONDENTS:(RESPONDENTS AND APPELLANTS 1, 7 AND 8 IN THE COURT BELOW AND 1ST PLAINTIFF, DEFENDANTS 1 & 2, 2ND PLAINTIFF 3RD DEFENDANT AND DEFENDANTS 9 & 10 IN THE TRIAL COURT.

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1. PANACHIKKAL VELAYUDHAN ALIAS ABOOBACKER, SON OF RAMU AYYAPPAN, KALPAKANCHERY AMSOM, THOZHUVANNUR DESOM, TIRUR TALUK, MALAPPURAM DISTRICT.
2. KRISHNANKUTTY ALIAS MOHAN, SON OF ARAMUGHAN PANACHIKKAL, OMACHAPUZHA AMSOM, MANLIPUZHA DESOM, TIRUR TALUK, MALAPPURAM DISTRICT.

3. AMMU ALIAS CHILLA, WIFE OF PANACHIKKAL ARAMUGHAN, OMACHAPUZHA AMSOM, KARINGAPARA DESOM, TIRUR TALUK,

MALAPPURAM DISTRICT.

4. KUNHMMA ALIAS SAINABA, DAUGHTER OF PANACHIKKAL ARAMUGHAN, DO.
5. VELU, SON OF KARIKUTTY ALIAS APPU, PANACHIKKAL, OMACHAPUZHA AMSOM AND KARINGAPARA DESOM, TIRUR TALUK, MALAPPURAM DISTRICT. (DIED ON 28-4-03)

6. VELAYUDHAN, SON OF PANACHIKKAL THEYYU, OMACHAPUZHA AMSOM, MANALIPUZHA DESOM, TIRUR TALUK.
7. MEENAKSHI, DAUGHTER OF DO. DO.

ADDL.R8 TO 10 IMPLEADED.

ADDL.R8. DEVAYANI, W/O.VELU, PANCHIKKAL, OMACHAPUZHA AMSOM, KANINGAPPARA DESOM, TIRUR TALUK, MALAPPURAM DISTRICT.

ADDL.R9. DEEPIKA, D/O.VELU, (MINOR AGED 13 REPRESENTED BY THE FIRST PETITIONER MOTHER DEVAYANI, RESIDING AT DO. DO.

ADDL.R10. DILEEP, S/O.VELU (MINOR AGED 5 YEARS) REPRESENTED BY THE FIRST PETITIONER MOTHER DEVAYANI, RESIDING AT DO. DO.

ADDL.R8 TO 10 IMPLEADED AS THE LEGAL REPRESENTATIVES OF THE DECEASED R5 AS PER ORDER DATED 2.2.06 IN I.A.392/05.

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BY ADV. SMT.R.MEERA FOR ADDL.R8 TO R10
SMT. PREETHY KARUNAKARAN, JAYASREE. S FOR R1,4,5 TO 7

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 11/4 /2007 THE COURT ON 11/04/2007 DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A. NO.615 OF 1993

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Dated this the 11th day of April, 2007

JUDGMENT

Defendants 4 to 8 in O.S.85/1983 on the file of Munsiff Court, Tirur are the appellants. Respondents 1 and 4 are the plaintiffs. Respondents 2 and 3 are defendants 1 and 2 and respondents 5 to 7 the other defendants. On the death of 5th respondent, respondents 8 to 10 were impleaded as his legal heirs.

2. Suit was filed by respondents 1 and 4 seeking a partition of plaint B schedule property. Plaint B schedule property is 1.08 acres in resurvey No.29/3 of Karingappara village of Tirur Taluk. According to the plaint allegations, plaint schedule property originally belonged to Panachikkal Karikutty. On the death of Panachikkal Karikutty, his rights devolved on his legal heirs as shown in the plaint A schedule genealogy. As per the genealogy, Karikutty had three sons, Velu,

Korappan and Theyyu and a daughter Kunhi. The allegation is that as Karikutty was following Makathayam Law of inheritance his rights devolved only on his sons. Velu the son of Karikutty had two sons, Karikutty alias Appu and Arumughan the predeceased son. second defendant is his widow and first defendant the son. On the death of Karikutty alias Appu, his rights devolved on defendants 3 to 6 his children and 7th defendant, widow. According to plaint allegations and the genealogy, on the death of Korappan, his rights devolved on his sons Ayyappan and Ramu, who married Kali who was subsequently converted to Islam and adopted the name Amina. Ayyappan and Ramu had four children in Kali. They are Nabeesa, plaintiffs 1 and 2, Korappan alias Abdurahiman. Nabeesa died as minor and her right devolved on the other children. It was alleged that Korappan left India 18 years before the institution of the suit and his whereabouts are not known to anybody and he is presumed to be dead and therefore 1/3rd share of

Korappan devolved only on plaintiffs. On the death of Theyyu, his rights devolved on defendants 8 to 10 his children. The case in the plaint was that defendants 8 to 10 together are entitled to 2/6 share which originally vested in Theyyu and plaintiffs are entitled to get 2/6 shares which originally vested in Korappan and 2/6 shares of Velu vests equally on defendants 1 and 2 as one group and defendants 3 to 7 as another group and each group is entitled to 1/6 share. A decree for partition is claimed on this basis. Defendants 1 and 2 resisted the suit contending that they did not know that Karikutty had a son by name Korappan. It was additionally contended that plaintiffs did not inherit any right as legal heirs of Karikutty and hence are not entitled to claim a share. According to defendants 1 and 2, Karikutty had no right over the plaint schedule property and plaint schedule property belongs to them under Ext.B1 and B2 and it is not available for partition. Defendants 4 to 7 filed a written statement

admitting the rights and claiming their share contending that they are prepared to pay the court fee for separation of their share. But they did not remit the court fee before the trial court or even before the first Appellate Court.

3. Learned Munsiff on the evidence of Pws.1 to 3 on the side of plaintiffs and DW1 on the side of defendants 1 and 2 and DW2 on the side of defendants 4 to 7 and Exts.A1 to A4 and B1 and B2 dismissed the suit holding that it was not established that Korappan was the son of Karikutty or plaintiffs inherited any right on the property of Karikutty. It was also found that plaint schedule property did not belong to Karikutty and plaintiffs or the other defendants are not entitled to claim a share as legal heirs of Karikutty. The suit was dismissed. Plaintiffs did not challenge the dismissal of the suit. Only defendants 3 to 10 filed A.S.69/1987 before Sub Court, Tirur challenging the findings of the trial court that plaint schedule property is not available for

partition. Learned Sub Judge on reappreciation of evidence confirming the decree of the trial court, dismissed the appeal. It is challenged in the Second Appeal.

4. The Second Appeal was admitted formulating the following substantial questions of law.

1) Whether courts below were right in ignoring the important recitals in the document relied on by the defendants while considering the availability of plaint schedule property for partition?.

2) Whether courts below were justified in ignoring the admissions of contesting defendants?

3) Whether courts below were correct in finding that plaint schedule property is not available for partition, when it is proved that at least portion of the plaint schedule property is available for partition?.

5. Though notice was served on respondents 2 and 3, the contesting defendants before the trial court and the first Appellate Court, they did not

appear. Learned counsel appearing for the appellants and respondents 1 and 4 were heard.

6. It is clear from the records of the courts below that the claim for partition was considered by the courts below mainly on the contentions raised by respondents 1 and 4 who claimed share contending that they are the children of Ayyappan and Ramu, the son of Korappan, in the light of defence raised by respondents 2 and 3 that they have no knowledge that Korappan was the son of Karikutty. Admittedly respondents 1 and 4, the plaintiffs, are following Mohammedian Law subsequent to the conversion. Their mother Kali was also converted to Islam. The arguments of learned counsel appearing for appellants was that courts below mainly considered the question whether Korappan was the son of Karikutty and whether plaintiffs are entitled to a share being the legal heirs of Ayyappan and Ramu, who are claimed to be the children of Korappan and courts below did not properly consider the claim for partition

raised by the appellants who are admittedly entitled to a share if the plaint schedule property is available for partition. It was pointed out that on the failure of plaintiffs to establish that they are entitled to a share being the legal heir of Korappan and that too on the failure to establish that Korappan was the son of Karikutty the suit and the appeal were dismissed and the dismissal of the appeal may not defeat the right of appellants to get their share in the plaint schedule property. I find force in the submission.

7.Though contesting defendants 1 and 2 in their written statement contended that they did not know Karikutty had a son by name Korappan and also denied the right of plaintiffs to claim a share as legal heir of Karikutty, the plaint A schedule genealogy was not disputed on any other aspect. Therefore it cannot be disputed that on the death of Panachikkal Karikutty, his rights devolved on his sons including Velu and Theyyu. The dispute could only be with regard to the existence of a son

by name Korappan. Even on that aspect, there was no specific denial that Karikutty had no son by name Korappan. What was contended was only that they did not know Karikutty had a son by name Korappan. That contention does not tantamount to denial of the fact that Korappan was the son of Karikutty.

8. The plaintiffs claimed share on the basis that they are the children of Ayyappan and Ramu who in turn were the children of Korappan, which was disputed by defendants 1 and 2. No acceptable evidence was adduced before the trial court to prove that Korappan was the son of Karikutty or that Ayyappan and Ramu are the children of Korappan, the son of Karikutty. It is on that basis the courts below held that plaintiffs are not entitled to a share. Though Exts.A1 to A4 were produced before the trial court, Exts.A1 and A4 only show that birth of first plaintiff was not registered in the register of births. They do not prove that first plaintiff was the son of Ayyappan

or Ramu or that Ayyappan and Ramu are the children of Korappan. Ext.A3 is the certificate of birth of Korappan. It is shown that he is a son of Ramu and Kali. The trial court on the evidence found that it is not established that Ramu is the son of Korappan and from the age shown in Ext.A3 it is not the birth certificate of Korappan the brother of the first plaintiff. Though Ext.A2 shows that in O.S.6/1928 on the file of Munsiff Court, Tirur along with Velu son of Karikutty, Ayyappan, son of Korappan was also a co-defendant. It does not show that the said Korappan is the brother of Velu or the son of Karikutty. There was no evidence to connect the said Korappan with the plaintiffs or with Karikutty. It is on that basis, courts below held that plaintiffs are not entitled to claim a share as legal heir of deceased Karikutty. Plaintiffs did not file an appeal or even a Cross Objection in the appeal filed by defendants 3 to 8 and therefore the finding as against them has become final.

9. The only question is whether the appellants are entitled to get a share in the plaint schedule property?

10. The learned Munsiff and the first Appellate Court held that there is no evidence to prove that plaint schedule property belonged to Panachikkal Karikutty and therefore appellants are not entitled to a share and the property belongs to defendants 1 and 2 under Exts.B1 and B2 and therefore plaint schedule property is not available for partition. As rightly pointed out by learned counsel appearing for appellants, the right transferred under Ext.B2 is the right obtained under Ext.B1. Ext.B1 shows that it consists of two items of property, though parts of the same Koorikkunnuparamba. The first item is the western portion having a measurement of 20x14 ½ ft. six ft.koles. The second item is the eastern portion having a measurement of 13x23 six ft.koles. As pointed out by learned counsel appearing for appellants, the total extent covered by kole measurements would come to less than 50

cents. Ext.B1 shows that document was executed by Velu and his brother Theyyu, the children of Karikutty in favour of Velayudhan the assignor under Ext.A2. It is not disputed that Velu and Theyyu the executants therein are the children of Panachikkal Karikutty under whom appellants are claiming right over the plaint schedule property. Ext.B1 further shows that the western portion of Koorikunnuparamba was obtained under document No.870/1915 by Velu from Ahammad Mappila and item No.2 was the property which originally belonged to Karikutty, the father of executants Velu and Theyyu. The right transferred under Ext.B1 by Velu and Theyyu are as legal heirs of Karikutty. If that be so, it is clear from Ext.B1 that item No.2 of Ext.B1 property originally belonged to Panachikkal Karikutty and it was assigned by Velu and Theyyu as legal heirs of Karikutty. When the plaint schedule property is having an extent of 1.08 acres and the property covered under Ext.B1 is less than half of that property, it cannot be

said that because of Exts.B1 and B2, plaint schedule property belongs to defendants 1 and 2 alone and other legal heirs of Velu or Theyyu are not entitled to a share.

11. The question is whether Ext.B1 property takes in the entire plaint schedule property and if not whether the balance extent belonged to Karikutty which is available for partition.? That question was not considered by the courts below. In such circumstance, the question is whether the case is to be remanded to the court below or the appellants are to be permitted to seek partition in a separate suit.

12. Considering the fact that appellants did not remit the court fee for claiming partition and question whether they are entitled to a share in the plaint schedule property could be determined only after proper identification of the properties covered under Ext.B1 and B2, and the suit was filed in 1982 and plaintiffs are found to be not entitled to a share, as they did not establish

that they are the legal heirs of Korappan, interest of justice does not warrant a remand of the suit. Interest of justice will be met, if appellants are permitted to institute a separate suit claiming partition. It is made clear that judgment in the present suit will not prevent appellants from claiming partition in a separate suit.

Second Appeal is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A.NO.615 /1993

JUDGMENT

11th APRIL,2007